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No. 141.

In the Supreme Court

OF THE

United States

Office Supreme Court,
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JAMES H. McKEN

OCTOBER TERM 1906.

EAST CENTRAL EUREKA MINING COMPANY (A CORPORATION), JAMES TOMAN AND ELIZA A. TOMAN,
Plaintiffs in Error,

vs.

CENTRAL EUREKA MINING COMPANY (A CORPORATION),
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

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BRIEF OF DEFENDANT IN ERROR

In this cause the Defendant in Error heretofore presented to this court a motion to dismiss the writ of error, presenting in that behalf a

printed argument in support thereof. By order of this court the further consideration of the motion was continued to the hearing on the merits. We respectfully invite the court's attention to the argument heretofore filed, and also submit during the course of the following brief such supplemental suggestions in that behalf as may seem pertinent to the question of jurisdiction of this Court.

STATEMENT OF THE CASE.

This is an action to quiet the title of Defendant in Error to the Summit Quartz Mine and the vein having its top or apex therein, and was brought pursuant to Section 738 of the Code of Civil Procedure of the State of California, which provides:

> "An action may be brought by any person "against another who claims an estate or in- "terest in real property adverse to him for "the purpose of determining such adverse "claim * * *."

The facts of the case as shown by the record and the several contentions of the respective parties may be best outlined by reference to a diagram (Figure 1) which is based upon the exhibits used at the trial and represents the physical conditions concerning which there is no controversy.

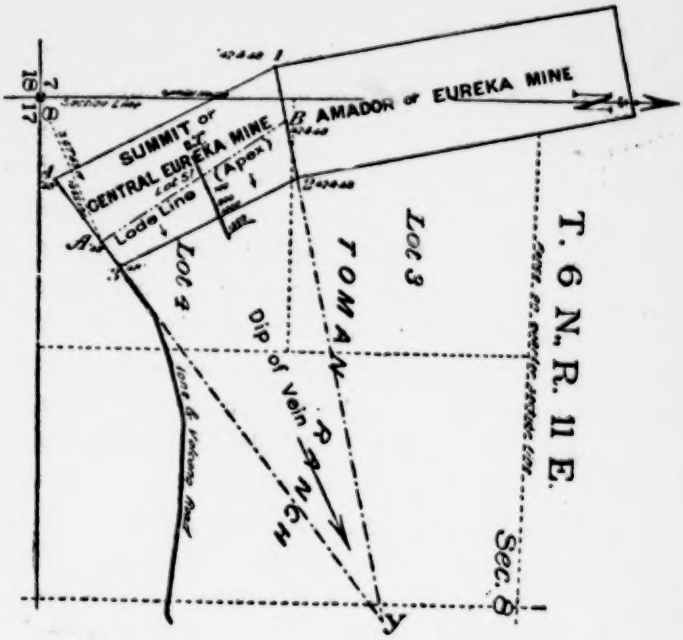

Figure 1.

The diagram shows the exterior boundaries of the Summit Quartz Mine (the lines connecting the corners 1, 2, 3, 4); also the position and course of the apex of the vein through the claim—the line A-B marked "Lode line (apex)." The lines of the claim which are crossed by the lode on its course and which therefore are the end lines in law, are those numbered respectively 4-3 and 1-2.

The downward course of the vein between the

extended end line planes is eastwardly in the direction indicated by the arrows—the angle of the dip being approximately 63 degrees below the horizontal. On such downward course the vein passes out of and beyond a vertical plane drawn through the East side line of the claim 3-2 and enters into and penetrates underneath the surface of the lands adjoining marked on the figure "Toman Ranch". There is no controversy over the title to the surface of the Summit Quartz Mine, or anything thereunder within its vertical boundaries. The end lines of the claim are not parallel, but converge in the direction of the dip, the extralateral extensions intersecting on a line represented in plan, on Figure 1, by the letter Y.

The title of Defendant in Error to the Summit Quartz Mine is derived by mesne conveyances, from Hall McAllister, the patentee from the government. This patent was isued November 25, 1873. It was based upon two mining locations made respectively in 1863 and 1865. (Findings of Fact, Record, folio 43.)

Application for patent was made February 7, 1871, (Record fol. 69), under the act of July 26, 1866, commonly known as the "Lode and Water Law", and such application was pending in the local land office at the time of the passage of the act of May 10, 1872. Final entry and payment were made October 11, 1872. The Register's final certificate of entry (Record, fol.

67), shows that such entry was made under the Act of 1866 and the Amendatory Act of 1870. The patent with the plat attached is set forth in full in the Record (folios 57-63.) It recites the entry to have been made pursuant to the Act of 1866, the Amendatory Act of 1870 and the Act of May 10, 1872, which latter act, as we will hereafter point out, preserved all rights theretofore existing, and all proceedings then pending upon applications for patents. Defendant in Error claims title to all that segment of the vein lying underneath the Toman Ranch, found within vertical planes drawn through the end lines of the Summit Quartz Mine and those lines produced in their own direction to the line of intersection at "Y."

Plaintiffs in Error, the Tomans, own the Toman Ranch by title derived through Government patents issued to their predecessors in title. One patent was issued December 1st, 1876, and the other August 20th, 1878, and both were made under the laws of the United States providing for the sale and disposition of what is known as "Agricultural Lands." Both said patents contain a limitation upon the Estate granted by the United States, giving the right to the proprietor of a vein or ledge "to extract and remove his ore "therefrom, should the same be found to pen- "etrate or intersect the premises hereby "granted." (Findings of Fact, Record, folio 44.)

Priority of title, if that be a matter of moment in this inquiry, is with Defendant in Error. The Agricultural Patents of Plaintiffs in Error are junior in point of time to the Mining patent under which Defendant in Error claims.

At the trial Plaintiffs in Error also offered in evidence what purported to be a quitclaim deed executed by Defendant in Error, dated December 31, 1898, conveying by the usual terms employed in that class of instrument a tract of land (among others not here involved) described as follows:

> " That portion of Sections eight and seven-
> " teen, Township Six (6) North, range
> " eleven (11) East Mt. Diablo base and meri-
> " dian, lying North of the center of that certain
> " wagon road extending between the town of
> " Ione and Volcano and known as the Ione
> " and Volcano Wagon Road and *lying East*
> " *of that certain patented mining ground*
> " *known as the Summit Quartz Mine*, and also
> " east of that patented mining ground known
> " as the Amador Consolidated Mine." Record, folio 162.

This describes what we call the Toman Ranch, and its situs, so far as it is essential to exhibit it for the purposes of this case, is shown on Figure 1, *ante*. The full boundaries are shown on plat marked Exhibit A, opposite page 10 of the Record.

It is not claimed that Defendant ever had any

title to the Toman Ranch connected with the paramount source. It appears from the resolution of the Board of Directors of Defendant in Error authorizing its execution, that this quitclaim deed was given for the purpose of extinguishing certain equities then existing in favor of Defendant in Error, arising out of a certain contract-bond or option to purchase the Toman Ranch from Plaintiffs in Error, the Tomans, who at all times were and still are the owners of the legal title to said ranch.

These are the essential facts. They may require elaboration in the course of the argument, but the foregoing statement will serve the present purposes.

CONTENTION OF PLAINTIFFS IN ERROR

Plaintiffs in Error contended in the court below, which contentions are renewed here, as follows:

1. That the end lines of the Summit Quartz Mine are not parallel. That the Act of May 10, 1872, which was in force at the time the patent was issued, required such parallelism as a condition precedent to the exercise of the extralateral right. Therefore that the Defendant in Error could not follow the vein on its downward course out of and beyond a vertical plane drawn through the East side line of the claim. That such part of the vein as

was underneath the surface of the Toman Ranch belonged to Plaintiffs in Error as the owner of such surface.

2. That, conceding that the patent for the Summit Quartz Mine conveyed an extralateral right, the quitclaim deed executed by the respondent describing the Toman Ranch operated to divest it of all title to so much of the vein as was underneath the surface of the property quitclaimed, to-wit, the Toman Ranch.

CONTENTION OF DEFENDANT IN ERROR.

Defendant in Error contended in the court below, and here contends, as follows:

1. That the title to the Summit Quartz Mine related back to the inception of the right, i. e., the locations in 1863 and 1865. Application for patent was made under the Act of 1866, and was pending in the local land office at the time of the passage of the Act of May 10, 1872. Under the Act of 1866, and under local customs in existence prior thereto, end lines were not required to be parallel. The Act of 1872 in terms preserved and confirmed pre-existing rights. The provisions therein contained as to parallelism of end lines was prospective only in its operation and not retroactive. The owners of the Summit claim had, prior to the passage of the Act of 1872, the right to follow the vein on its downward course, between its extended end line planes, out of

and beyond the vertical east side line plane and underneath the Toman Ranch. This right was confirmed by the Act of May 10, 1872.

2. If this be not true, and we are to consider that the rights of Defendant in Error are to be determined by the proper construction of the provision of the Act of May 10, 1872, requiring end lines to be parallel, the end lines of the Summit Quartz Mine converge in the direction of the dip. The object of parallelism is to prevent a lode locator from obtaining in depth beyond his vertical boundaries more of the vein in length than he has within his boundaries. As with converging end lines, the lode locator acquires less in length along the vein in depth than he has at the surface, the reason of the rule ceases. So should the rule.

3. The grant of the vein throughout its entire depth between the end line planes of the Summit Quartz Mine extended, severed the title to that part of the vein lying underneath the surface of the Toman Ranch from the title to the surface. The vein between these planes was essentially a part of the Summit Quartz Mine. It is not, nor was it ever a part of the Toman Ranch, and title to it could not pass by a deed, quitclaim or grant, describing simply the Toman Ranch or its boundaries. The underlying vein was no part of the Toman Ranch. The description contained in the quitclaim deed, "All "that portion . . . lying east of that certain

"patented mining ground known as the "Summit Quartz Mine," excludes from the operation of the instrument, all that was conveyed and patented by the mining patent for the Summit Quartz Mine.

4. An examination of the quitclaim deed in the light of the surrounding circumstances, the different character of the two properties and the apparent motive for the conveyance, discloses a manifest intent not to convey to the plaintiffs in error any part of the property which belonged to the defendant in error by virtue of its patent to the Summit Quartz Mine.

THE DECISION OF THE SUPREME COURT OF CALIFORNIA.

Upon these facts and contentions, the Supreme Court of California decided in substance as follows:

1. Under the Act of 1866 end lines were not required to be parallel. The locations on the Summit vein having been made prior to the passage of the Act of 1872, the fact that the end lines were not parallel did not deprive the locator of the extra lateral right between the converging end line planes. The intention of Congress in passing the Act of 1872 was to preserve to the prior locator everything that his location would have given him had the Act of 1872 not been enacted. and to confer additional rights. Applications for patent having been made under the

Act of 1866, under which act end lines were not required to be parallel, it was left to the Land Department to determine as to any such alleged prior location, what the rights of the locator were under the previous Acts and in accordance with the procedure laid down by the Act of 1872, to issue a patent conveying the title of the Government so far as might be necessary to effectuate such rights.

2. Those parts of the Summit vein underlying the Toman Ranch were no part of that Ranch. Title to such vein had been severed from the title to the land, and the vein did not pass under the quitclaim deed from the defendant in error to the plaintiff in error.

3. From an examination of the deed in question in the light of the circumstances surrounding its execution as disclosed by the record, it is apparent that there was no intention to convey any part of the mining claim.

The decree of the trial court in favor of defendant in error was affirmed.

The opinion appears on pages 86-93.

Petition for rehearing in bank was denied. (Record, fol. 220.)

THE ASSIGNMENTS OF ERROR.

These are five in number. Assuming that this court has jurisdiction, the case before the court may be briefly epitomized.

1. What rights in the Summit vein underneath the surface of the Toman Ranch accrued to the patentees of the Summit Mine?

2. Assuming that defendant in error owned the vein underneath the Toman Ranch, was any part of it conveyed to plaintiffs in error, by the quitclaim deed?

FEDERAL QUESTION.

On the foregoing analysis of the facts and contentions of the parties and the record before this court, we again refer to the jurisdictional question, and our motion to dismiss the writ of error.

No where in the record was any federal question raised in the lower courts by plaintiff in error. There is no federal question stated unless we refer to that part of the opinion of the Supreme Court of the State of California which describes rights which accrued to *Defendant in Error* under its mining patent. The plaintiffs in error never specially set up or claimed in the State Courts any right, title or immunity under any Federal Statute by any controverted construction of which they might be denied such right, title or immunity or the same might in any way suffer impairment or diminution. The first specific announcement of any such claim appears in their assignments of error in this court. The mere fact that the Supreme Court of the State of California discussed in its opinion the alleged infirmities of defendant in error's title, is, we respectfully submit, not a sufficient foundation

on which to predicate a writ of error from this court at the instigation of plaintiff in error.

The stress of the claim of plaintiff in error seems to have rested upon the deed and its construction by the State Courts. This certainly involves no federal question.

The ruling of the State Courts as to what passed by the deed, was of itself practically decisive of the whole controversy. With these supplemental suggestions as to our motion to dismiss we pass to the consideration of the case on its merits.

ARGUMENT.

The Property Rights Conveyed by the Patent to the Summit Quartz Mine Located under the Lode and Water Law of July 26, 1866.

As the rights of defendant in error had their origin in locations antedating the passage of the Act of May 10th, 1872, application for a United States patent having been instituted under the Act of 1866, it is pertinent to inquire, what rights had accrued to the locator and patent applicant at the time of the passage of the Act of 1872, and to what extent were the previously existing rights affected by the passage of that Act?

There is within the surface boundaries of the Summit Mine 1165.56 linear feet of the apex of the vein. The locations upon which the patent proceedings were based, and upon which the

patent was issued, were made at a time when the lode or vein was the thing acquired by location and the surface adjacent thereto a mere incident. This was the rule under the first mining law passed by Congress, known as the "Lode and Water Law," which went into effect July 26, 1866,

(14 U. S. Stats. at Large, p. 451),

under which act patent for the Summit Mine was applied for.

This act was but a crystallization of the miners' rules and customs which prior to Congressional action formed the Pacific Coast common law of mines.

Jennison v. *Kirk,* 98 U. S. 453, 456;
Broder v. *Natoma Water Co.,* 101 U. S. 274, 276;
Chambers v. *Harrington,* 111 U. S. 350, 352;
N. P. R. R. v. *Sanders,* 166 U. S. 620, 634.

Under the local rules, as well as under the Act of 1866 the lode was the principal thing and the surface was in reality an incident.

Johnson v. *Parks,* 10 Cal. 447, 449;
Patterson v. *Hitchcock,* 3 Colo. 533, 534;
Wolfley v. *Lebanon Min. Co.,* 4 Colo. 112, 116;
Walrath v. *Champion M. Co.,* 63 Fed. 552, 556.

Upon this subject we may quote with profit from a decision by this court, speaking through Justice Brewer:

"The purpose herein (the Act of 1866) "manifested was the conveyance of the vein, "and not the conveyance of a certain area "of land, within which was the vein. . . . "Nowhere was there any express limitation "as to the amount of land to be conveyed. . . . "Obviously, the statute contemplated the pat- "enting of a certain number of feet of the par- "ticular vein claimed by the locator, no mat- "ter how irregular its course, made no provis- "ion as to the surface area, or the form of the "surface location, leaving the land depart- "ment in each particular case to grant so "much of the surface 'as was fixed by local "'rules', or was, in the absence of such rules, "in its judgment necessary for the conven- "ient working of the mine."

"As might be expected, the patents issued "under this statute described surface areas "very different, and sometimes irregular in "form. Often they were like a broom, there "being around the discovery shaft an amount "of ground deemed large enough for the con- "venient working of the mine, and a narrow "strip extending therefrom as a handle of the "broom. This strip might be straight, or in "a curved irregular line, following, as was "supposed, the course of the vein. Sometimes "the surface claimed and patented was a tract "of considerable size, so claimed with the "view of including the apex of the vein, in

"whatever direction subsequent explorations "might show it to run. And again, where "there were local rules, giving to the dis- "coverer of a mine possessory rights in a cer- "tain area of surface the patent followed "those rules and conveyed a similar area."

Del Monte M. and M. Co. v. *Last Chance M. Co.*, 171 U. S. 55, 64.

As was said by Justice Field sitting as Circuit Justice:

"It is true, as stated by the defendant, that "the surface land taken up in connection "with a linear location on the ledge or lode "is under the Act of 1866 intended solely "for the convenient working of the mine and "does not measure the miner's right either "to the linear feet upon its course or to fol- "low the dips, angles, and variations of the "vein or control the direction he shall take."

Eureka Case, 4 Sawy. 302, 323.

Before patent if no attempt was made to inclose the lode within surface boundaries the locator might pursue it in its course or strike to the extent of the number of feet claimed. The notice of location usually called for so many feet on the vein and a misdescription as to its course did not vitiate the location. The locator had a right prior to patent to follow it wherever it ran.

Johnson v. *Parks*, 10 Cal. 447, 449.

The locator could hold out one lode or vein.

Del Monte M. & M. Co. v. *Last Chance M. Co.*, 171 U. S. 55, 65.
Walrath v. *Champion M. Co.*, 63 Fed. 552;
Eureka Case, 4 Sawy. 302, 323;
Eclipse G. & S. M. Co., v. *Spring*, 59 Cal. 304, 305.

A patent could be issued but for one vein.

Walrath v. *Champion M. Co.*, 171 U. S. 293, 305.

End lines at the surface were implied in the sense that they marked the limits on the vein beyond which the miner could not go on the strike or course of the vein.

If the locator inclosed his vein within defined surface boundaries, he could not follow his vein on its course outside of such boundaries.

Flagstaff v. *Tarbet*, 98 U. S. 463;
McCormick v. *Varney*, 2 Utah 355;
Wolfley v. *Lebanon*, 4 Colo. 112;
Johnson v. *Buell*, 4 Colo. 557.

"Under the Act of 1866 parallelism in "end lines of a surface location was not "required."

Iron Silver M. Co. v. *Elgin M. & S. Co.*, 118 U. S. 196, 208.

Whenever and wherever the question of the nature and extent of extra lateral right as it

existed under the local rules and customs and under the Act of 1866 has been under discussion in the courts, both Federal and State, the foregoing principle has been clearly enunciated, as the following excerpts from the opinions will show:

"In the first place it does not appear upon "what locations the patents were issued. "They may have been and probably were "issued upon locations made under the Act "of 1866 where such parallelism in the "end lines of surface locations was not "required.

Judge Field in Eureka Case, 4 Sawy. 302, 319; affirmed 103 U. S. 839, 847.

"Under the Act of 1866 parallelism of "end lines was not required."

Walrath v. *Champion Co.*, 63 Fed. 552, 556.

"The location was made under the law "of 1866 which did not require parallelism "of end lines."

Con. Wyoming G. M. Co. v. *Champion M. Co.*, 63 Fed. 540, 550.

"When these locations were made there "was no law requiring such parallelism."

Carson City G. & S. M. Co. v. *North Star M. Co.*, 73 Fed. 597, 599.

"The Act of 1866, under the provisions "of which the patent in this case was ap-

"plied for and under which the rights of "defendant in error accrued, did not re- "quire parallelism of end lines."

Carson City G. & S. M. Co. v. *North Star M. Co.* (C. C. A.), 83 Fed. 658, 969;

Certiorari denied by this Court, May, 1898.

"Parallel end lines were not required in "locations by the law of 1866 and yet ex- "tralateral rights were specifically given."

Argonaut Min. Co. v. *Kennedy M. Co.*, 131 Cal. 15, 25.

Clearly if the patent to the Summit Mine had been actually issued prior to the passage of the Act of May 10th, 1872, there would be no question as to the right of the Patentee to follow the vein on its downward course underneath the surface of the Toman Ranch, an agricultural grant junior in point of time to the mineral patent.

"It is not disputed," says the Supreme Court of California in its opinion in this case, "that had the patent issued prior to the "passage of such act it would have conveyed "the extralateral right between the converg- "ing end planes."

Opinion Record, p. 88, fol. 201.

Plaintiffs in error in their brief, p. 16, says:

"Of course if McAllister (patentee of "the Summit claim, and predecessor in title "of defendant in error) had acquired vested "rights to an extralateral right on the ledge, "Congress could not take it away by repeal- "ing the Act of 1866 or any part of it."

But counsel say that no vested right had accrued because the Surveyor General had not at the date of the passage of the act approved the survey. The vice of this suggestion is apparent. A right became vested by location—not by approval of the survey. The surveyor's duty was limited to a survey of the location as claimed by the patent applicant. The approval of the survey was simply an incidental step in the patent proceeding.

This Court has twice said: "A lode locator acquires a vested property right by virtue of his location."

Clipper M. Co. v. *Eli M. Co.*, 194 U. S. 220.

Creede and Cripple Creek M. Co. v. *Uinta Tunnel Co.*, 196 U. S. 337, 342.

At this juncture a brief summary of the Act of 1866 with regard to patent applications and a statement of the status of the application for patent for the Summit Quartz Mine at the date of the passage of the Act of May 10, 1872, may be pertinent.

The order of proceedings to obtain patent for

a quartz mining claim under the Act of 1866 were as follows:

1. The filing by the applicant in the local land office of a diagram of the claim "so ex- "tended laterally or otherwise as to conform "to the local laws, customs and rules of "miners."

2. The posting of the diagram on the claim with the notice of intention to apply for patent also posting in the Register's office.

3. Publication of notice of such application by the Register for 90 days.

After the expiration of this period, if there were no adverse claims, it was the duty of the Surveyor General to survey the premises and approve the plat. Upon such approval and filing with the Register, the applicant might enter and purchase the same.

Act of July 26, 1866, secs. 2 and 3, 14 Stat. at Large, chap. 262, p. 251.

The record shows that prior to October 30, 1871, the provisions of the laws as to posting and publication had been complied with and that there were no adverse claims.

Register's Certificate Record, p. 53.

The claim was surveyed by the Surveyor General's deputy January 22, 1872.

So that when the Act of May 10, 1872, was passed the proceeding *in rem* so far as exclud-

ing adverse claimants were concerned and the actual survey in the field had been perfected. Thereafter the matter took its course by gravity until the issuance of the patent.

The Act of May 10, 1872 and its effect on the rights of the owner of the Summit Mine therefore acquired.

It is pertinent to inquire to what extent, if any, did the Act of May 10, 1872, either impair the rights of the locators of the Summit Mine previously acquired or impose upon them additional burdens as to rectification of lines, and commencing patent proceedings *de noro.*

That the Act of May 10, 1872, was a radical departure from the previous law—not only as to the manner of making locations but as to the patent proceeding.

Under the Act of 1872 the miner locates a surface which must be so defined as to include the top or apex of his lode. Failing in this he obtains practically nothing. If he mistakes the course of his vein it is his loss. He can only hold the vein on its course to the extent that the top or apex thereof is found within his boundaries.

> *Del Monte M. & M. Co.* v. *Last Chance M. Co.*, 171 U. S. 55, 84.

He may thus acquire a superficies 1500 feet in length by 600 feet in width if local regulations do not restrict these measurements.

In other words under the old law he located

the lode with such area adjacent to it as might be necessary for its convenient working or as might be permitted under local rules. Under the new he must locate a piece of land containing the top or apex of the lode. While the vein is still the principal thing, in that it is for the sake of the vein that the location is made the location must be of a piece of land including the top or apex of the vein. The end lines of his location must be parallel and cross wise of the vein, otherwise he cannot pursue his lode or lodes on their downward course beyond his vertical side line planes.

> *Del Monte M. & M. Co.* v. *Last Chance M. Co.*, 171 U. S. 55, 88;
> *Calhoun G. M. Co.* v. *Ajax G. M. Co.*, 182 U. S. 499, 508.

Under the old law he could acquire but one vein. Under the new he acquired all other veins having their tops or apices within the surface of boundaries of the location, the extralateral rights on all veins being defined by the same set of end line planes.

> *Walrath* v. *Champion M. Co.*, 171 U. S. 293.

The law also gives to claims previously located all such other veins the tops or apices of which may be found within the location.

Before discussing these "other veins," if found, within these prior claims let us consider briefly

the effect of the Act of 1872 upon previously acquired rights.

No one can read the provisions of the Act of May 10th, 1872, without being impressed with the extreme care manifested by Congress in the preservation of pre-existing rights. In three different parts of the Act we find carefully expressed phrases protecting all rights previously acquired under existing laws. We quote the following from the Act:

Section 9 provided as follows (italics are ours):

> "That sections one, two, three, four and "six of an Act granting the right of way to "ditch and canal owners over the public "lands and for other purposes, approved "July 26, 1866, are hereby repealed, *but "such repeal shall not affect existing rights.* "Applications for patents for mining claims "now pending may be prosecuted to a final "decision in the General Land Office but in "such cases, where adverse rights are not "affected thereby, patents may issue in "pursuance of the provisions of this Act. "And all patents for mining claims hereto-"fore issued under the Act of July 26, 1866, "shall convey all the rights and privileges "conferred by this Act where no adverse "rights exist at the time of the passage of "this Act."

In section 12 we find the following:

> "Nothing in this Act shall be construed

"to enlarge or affect the rights of either "party in regard to any property in con- "troversy at the time of the passage of the "Act entitled 'An Act granting the right of "'way to ditch and canal owners over the "'public lands and for other purposes, ap- "proved July 26, 1866, *nor shall this Act "affect any right acquired under said Act.*"

And section 16 provides:

"That all acts and parts of acts incon- "sistent herewith are hereby repealed; *pro- "vided that nothing contained in this Act "shall be construed to impair in any way "rights or interests in mining property ac- "quired under existing laws.*"

Act of May 10, 1872, 17 Stat. at Large, chap. 152, p. 91.

As was said by Justice Field in the Eureka case:

"The Act of 1872 preserves to the miner "the rights acquired by him under the Act "of 1866 and confers upon him these addi- "tional rights."

Eureka Case, 4 Sawy. 323.

"The Act of 1872 must be so construed as "not to impair any right which either had so "acquired."

Eclipse G. & S. M. Co., 59 Cal. 306.

In discussing the effect of the Act of 1872 on rights previously acquired, the Supreme Court

of the State of California expresses the following views, speaking through Justice Temple:

> " I think it would have been competent for " Congress to have required parties who " had equitable rights to patents to cause " such adjustments of their surface lines as " would indicate and define their extra- " lateral rights—in other words to have made " their end lines parallel before a patent " would issue, on pain of losing all extra- " lateral rights. There are no such provi- " sions in the Act of 1872, but the rights of " locators under former laws are expressly " confirmed to them."
>
> *Argonaut M. Co.* v. *Kennedy M. Co.*, 131 Cal. 15, 25.

This principle is restated and reaffirmed in the cause at bar.

Opinion Record, p. 89.

There are several cases in the Federal courts where the question under consideration has been considered—to which cases attention may be invited.

The case of *Carson City G. & S. M. Co.* v. *North Star M. Co.*, tried before Judge Beatty of Idaho sitting as Circuit Judge whose opinion appears in 73 Fed. 597, is an exact parallel to the one at bar.

We present herewith as Figure 2 a diagram from which the facts of the case may be readily understood.

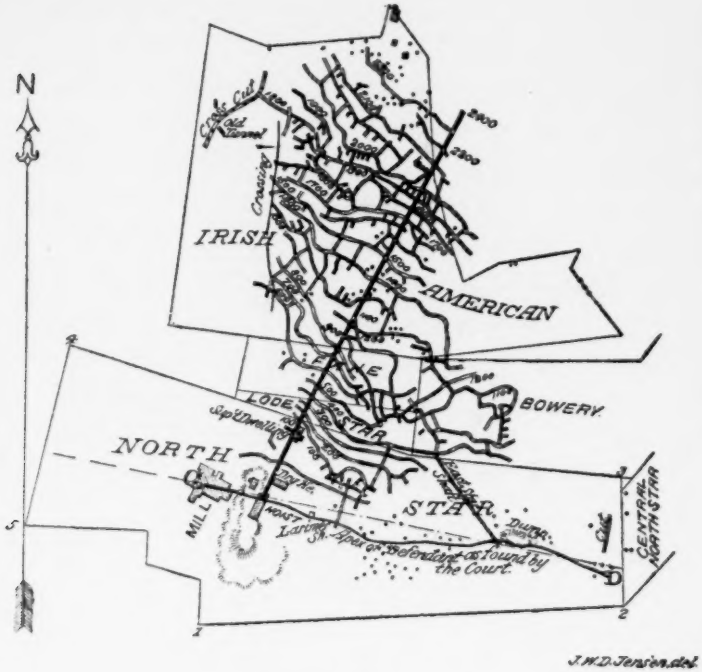

Figure 2

The North Star was a consolidation of a number of locations, all made before the passage of the Act of 1872. Patent was applied for September 15, 1869, and issued August 11, 1875.

See findings 83 Fed., p. 859.

Patent application was therefore pending, as in the case at bar, when the Act of 1872 was passed. The end lines were not parallel but converged in the direction of the dip (north). On its downward course the vein penetrated

underneath the surface of the Irish American, owned by the Carson City G. & S. M. Co., as shown by the extensive underground workings of the North Star Company, appearing in horizontal projection on the diagram. The Carson City Company as the owner of the overlying surface sued the North Star Company for the value of the ore extracted under the Irish American, contending as appellants here contend that, by reason of the non-parallelism of the end lines of the location, the apex proprietor was denied all extralateral right, and that the ownership of the ore bodies in controversy was an incident to the ownership of the surface.

The Court decided to the contrary. We quote from the opinion:

> "When these locations were made there "was no law requiring such parallelism, but "independent of all lines the right to follow "the ledge along its course for the full dis- "tance claimed and underground on its true "dip to any depth was undisputed. Although "section 9 of the Act of 1872 in repealing "certain parts of the old law provided that "'such repeal shall not affect existing rights' "the Courts have held that when any claim "is patented, those rights are controlled by "the patented lines."
>
> 73 Fed., p. 599.

This decision was affirmed by the Circuit Court of Appeals, the Court saying:

"The plaintiff in error contends that if the "patented area of the North Star is to be "considered as a location, its end lines are "not parallel, as found by the Court, and "that under section 2320, Revised Statutes, "the defendant in error possesses no extra-"lateral right under it. The Act of 1866 "under the provisions of which the patent "in this case was applied for, and under "which the rights of defendant in error ac-"crued, did not require parallelism of end "lines."

83 Fed. 658, 669.

The Carson City Company applied to this Court for a writ of *certiorari* to review this decision, but the Court declined to interfere.

Mem. Decision, 171 U. S. p. 687.

In a case decided by Judge Hawley sitting as Circuit Judge, prior to the ruling in the North Star case, a similar doctrine in a case of converging end lines was applied to the Wyoming or slate vein involved in that case, (*Cons. Wyoming* v. *Champion M. Co.*, 63 Fed. 540, 542) and the extralateral right of the Wyoming Company on this vein was determined to have ceased at the point of junction of the converging end line planes as illustrated in the annexed diagram.

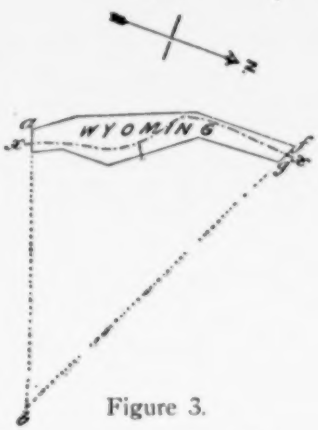

Figure 3.

Plaintiffs in error take the position that the patentee of the Summit Quartz Mine having accepted a patent issued after the passage of the Act of 1872, he is bound by the provisions of the law requiring parallelism of end lines, and that because he did not commence his patent proceedings *de novo* after the passage of the Act of 1872, go into the field, reform his lines, and post and publish a new notice, no extralateral right accrued to the patentee because the end lines converge in the direction of the dip. Their main reliance to sustain this position rests on the opinion in the case of *New Dunderberg* v. *Old*, 79 Fed. 598. Counsel misapprehends the opinion in this case, as the Supreme Court of California in its opinion in the cause at bar clearly points out.

Opinion Record, p. 90, fols. 207, 208.

The following diagram (Figure 4) illustrates the facts of Dunderberg v. Old case.

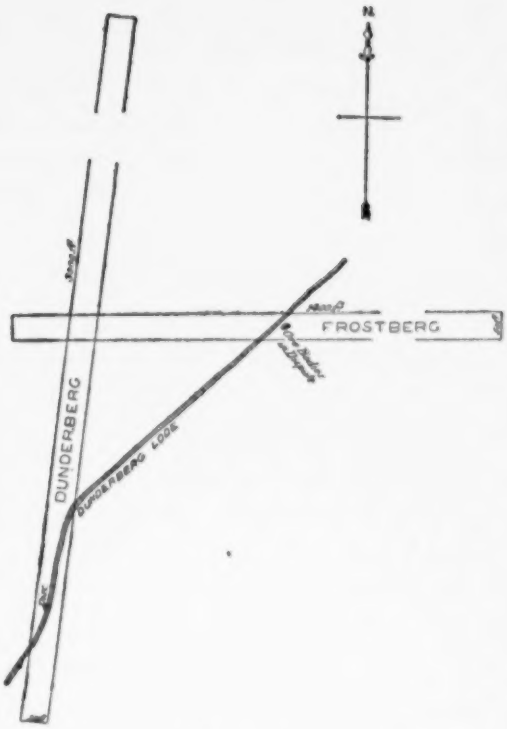

Figure 4.

Both the Frostberg and Dunderberg lode claims were located under the Act of 1866. The Frostberg had passed to entry prior to the passage of the Act of 1872. The Dunderberg evidently applied for a patent under the Act of 1872. The vein, as will be observed from the diagram, instead of passing through the Dunderberg claim parallel to the lines located as side lines crossed it diagonally—on its course—passing out of the east side line, and after traversing

the intervening space between that line entered the south line of the Frostberg and passed out of the north line of that claim. The ore bodies in dispute were within the Frostberg lines. The owners of the Dunderberg contended that having located the claim under the Act of 1866, they had a right to follow the vein on its *course* or *strike*, outside of and beyond their patented boundaries, and into the Frostberg, the prior claim. The Court held that the Dunderberg owners having fixed their surface boundaries, purporting to inclose the vein, they were bound by them, and could not pursue the vein on its *course* beyond the vertical boundaries of the Dunderberg claim.

As the Court significantly said:

> "It was not the repeal of these sections of "the Act of 1866 that affected the rights of "the owner of the Dunderberg Lode. That "repeal did not deprive him of any right he "had to follow his lode into the Frostberg "claim. It was his location, entry, and "patent of his claim from which the lode "departed on its strike 300 feet before it "reached the Frostberg that affected his "rights."
>
> *New Dunderberg* v. *Old*, 79 Fed. 598, 605.

It is quite manifest that the owner of the Dunderberg would have found himself precisely in the same legal predicament, and the decision of

the case would necessarily have been the same had the patent to the Dunderberg claim been issued prior to the passage of the Act of 1872. In this respect both acts were based upon the principle heretofore alluded to—that when the locator inclosed his vein within defined surface boundaries he could not follow the vein in its course or strike beyond these boundaries.

Wolfley v. *Lebanon*, (Act of 1866), 4 Colo. 112;

McCormick v. *Varnes*, (Act of 1866), 2 Utah 355;

Flagstaff v. *Tarbet*, (Act of 1866), 98 U. S. 463;

Eureka Case, (Act of 1866), 4 Sawy. 302.

Argentine v. *Terrible*, (Act of 1872), 122 U. S. 478.

Counsel for plaintiff in error cite the case of *Lakin* v. *Dolly*, 53 Fed. 337, in aid of their contention. There is this to be said concerning that case. In the first place the controversy there was over surface ground only. In the second place the Circuit Court of Appeals in subsequent cases so explained the doctrine of the Lakin-Dolly case as to deprive appellant's argument of all plausibility.

We present a diagram (Figure 5) showing the Mammoth Claim, the property involved in the Lakin cases. The shaded lines represent the ground as to which the Court held the patent was

valid. The unshaded portion embraced the town of Johnsville covering 252-95 acres of land connected with the location of one lode, and as to this portion the Court held the patent to be void.

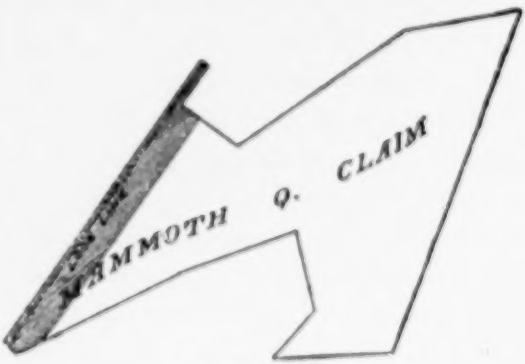

Figure 5.

The application for patent was made in 1867 but no entry or payment was made until 1877.

It appeared at the trial of the case *upon an agreed statement of facts* that when the Mammoth claim was located, there was no local rule, usage or custom authorizing the surface to be appropriated in excess of 100 feet on each side of the vein, and that the unshaded area shown in the diagram never was covered by the Mammoth location. This was an admission which practically went to the jurisdiction of the Land Department to grant a patent for an area in excess of the quantity allowed by local rules.

At all events, the case has since been twice explained by the same appellate court which

handed down the opinion. The first explanation will be found in *Carson City Min. Co.* v. *North Star Min. Co.*, 83 Fed. 658, the opinion being written by Judge Hawley who originally decided *Lakin* v. *Dolly*, (53 Fed. 333). In the recent case of *Peabody Gold Mining Co.* v. *Gold Hill M. Co.*, 111 Fed. 817, the same Court thus disposes of the *Lakin* v. *Dolly* case:

> "The admitted facts effectually rebutted
> "the presumption which otherwise would
> "have attended the patent, the presumption
> "that the locator was lawfully entitled to
> "all the premises described in his grant and
> "that all of the previous requisites of the law
> "had been complied with."

A further argument of plaintiff in error upon this branch of the case may be noticed. This is in effect as follows:

The Act of 1872 conferred upon previous locators all lodes found within the claim other than the one previously acquired, title to which was confirmed by the Act. That the extralateral right awarded by the Act to these other lodes was predicated on a parallelism of end lines. As the end lines were not parallel, there is no extralateral right as to the other lodes. Therefore, there is no extralateral right on the original lode. This is clearly a *non sequitur*. It may be noted parenthetically that there are no lodes other than the original involved in this action. If there

were it might be plausibly said that as to such lodes there would be no extralateral right, as the terms under which these other lodes were given to the prior locator, *i. e.*, parallelism of end lines, were not complied with. That if the applicant for patent had desired to avail himself of the grant of other lodes in their extralateral extensions he should have reformed his boundaries and paralleled his end lines. As to these other lodes the prior locator's rights date from the donative provisions of the Act of 1872, and are to be measured solely by the terms of that Act. As to the original lode it is accepted as a well-established rule of law that the title conveyed by a mining patent relates back to the inception of the right; that is to the location on which the patent is based.

Heydenfeldt v. *Dancy G. & S. M. Co.*, 93 U. S. 634;

St. Louis Smelting Co. v. *Kemp*, 104 U. S. 636.

Deffebach v. *Hawk*, 115 U. S. 392.

Calhoun G. M. Co. v. *Ajax G. M. Co.*, 182 U. S. 499.

Uinta T. & M. Co. v. *Crude and Cripple Creek M. Co.*, 119 Fed. 164; S. C. on *certiorari*, 196 U. S. 337.

The Supreme Court of California in its decision of the cause at bar as to this point expressed itself as follows:

"The patentee did not waive or renounce "any extralateral right by the acceptance of "the patent. It is true that the patent did "in accordance with the express provisions of "the Act of 1872 purport to grant in addi- "tion to the vein or lode originally located the "right to all other veins or lodes the top or "apex of which lay inside of the surface lines "of the location extended downward vertically "to their entire depth although in the course "downward they extended outside the verti- "cal side lines. It might perhaps be con- "tended with some force that as to the other "veins and lodes, which were not embraced "within the original location and the right "to which was for the first time given by "the Act of 1872, the requirement as to "parallelism of end lines might preclude any "extralateral right. But the patent in terms "also purported to grant the 1165.56 linear "feet of the original vein throughout its en- "tire depth between the end lines continued "in their own direction. By the acceptance "of such a patent there was no indication of "any intent to waive or renounce any right "to follow the vein between the end lines, "given by the original location for those "rights were expressly confirmed thereby and "plaintiff (defendant in error) bases its "claim entirely thereon. We cannot see that "the legal effect of such an acceptance was "a waiver or renouncing of any such right. "These particular rights the patentee was "entitled to, even though his end lines were

"not parallel and the fact that the patent "purported also to grant something else to "which he may not have been entitled can- "not affect his rights as to the original lode, "which are also confirmed by the patent. It "is true that the patent recites on its face "that it is issued in pursuance of the Act of "1872, but it also recites that it is issued in "pursuance of the Act of July 26, 1866, and "the Act amendatory thereof approved July "9, 1870, and in conjunction with the public "records in evidence shows that it was issued "upon locations made prior to May 10, 1872, "and upon an application pending at that "date."

Opinion Record, p. 90.

It seems to us that this construction of the law points the way out of serious difficulties. It gives to the law of 1872 a prospective operation as to anything purporting or claiming to have originated under it—avoids giving to the statute a retroactive effect—and gives full weight to its confirmatory provision. If this rule is to obtain the sanction of this Court, the Courts will not in the future be embarrassed in deciding cases where there are discovered secondary veins with erratic and differing dips within claims patented under the Act of 1866 with irregularly shaped surfaces, valid under the law under which they were issued as to the original lode, but creating extremely complex conditions as to secondary

veins where the end lines are not parallel. As to the original lode rights are preserved as the law plainly indicates they should be. As to the other lodes which were mere gratuities, no extralateral rights will be granted if the end lines are not parallel.

If the location of the Summit Claim be dealt with as one originating solely under the Act of 1872, the end lines, although not parallel, converge in the direction of the dip, giving the locator less of the vein underneath the surface than at the surface. The grant of the extralateral right within the converging end-line planes is within the spirit and intent of the Act of 1872, and therefore valid.

The object of the requirement in the Act of 1872 as to parallelism of end lines was to prevent the locator in following his vein downward from acquiring a greater length underneath the surface than he had apex at the surface.

Del Monte M. & M. Co. v. *Last Chance M. Co.*, 171 U. S. 55, 85.

As was said by this Court, speaking through Justice McFarland, (italics are ours):

"Of course, when end lines diverge to any "considerable extent from a perfect parallel, "they might, when extended in their own "direction, include on one side at least "greater length of ledge outside the side "lines than within them, and in such case,

"if the owner undertook to mine outside ore "in or near the diverging end line, some "difficulty might arise; *and it was, no doubt, "the purpose of section 2320 to prevent a "party from claiming more outside his lines "than within them.*"

Doe v. *Sanger*, 83 Cal. 203, 213.

The following excerpt from an opinion rendered by the Circuit Court of Appeals in the North Star case, heretofore cited, is at least persuasive (see Figure 2, *ante*):

"The end lines as marked on the diagram "converge in the direction of the dip giving "the patentees less of the vein or lode in "depth than they had at the surface. The "object of the Act of 1872 in requiring "parallelism of end lines was intended to "give to the claimant of the lode as much "of the lode or vein in its downward course "as he has at the surface but no more. It "appears from the findings that the defend-"ant in error was only allowed 2200 feet of "the apex of the lode because it was cut off "on the west by a 'crossing,' as shown in "the diagram. The restriction of its rights "in these particulars cannot be complained "of by the plaintiff in error."

Carson City G. & S. M. Co. v. *North Star M. Co.*, (C. C. A.), 83 Fed. 658, 669.

The Supreme Court of California in its opinion in the Argonaut-Kennedy case, in commenting on this last-cited decision said:

"A case has been cited in which the end "lines of the location converge in the direc- "tion of the dip. (*Carson City etc. Min. "Co. v. North Star Min. Co.*, 73 Fed. Rep. "597.) It was held that the locator had "extralateral rights because the conveyance "would give less, rather than more, on the "dip of the vein. This may be all right, as "it seems to me, however, not because the "patent carries less, rather than more, than "would pass had the end lines been parallel, "but because that which is granted is "described so that it can be definitely located. "Under the force of the restriction con- "tained in section 3 of the law of 1872, the "locator could not take beyond planes "through his end lines. This confined him "within well-defined boundaries to less on "the dip below the surface than he had upon "the surface. If this was an attempt to con- "strue the Act of 1872, the logic might be "questioned. That act, as construed, does "not grant extralateral rights, because the "end lines are parallel or converge toward "the dip of the vein, but if they are parallel. "The location there under consideration was "made under the Act of 1866, and carries "extralateral rights because the extent of "such rights are definitely described. At "least, such was the fact, and no other rea- "son was required. It was, therefore, not

"necessary in that case to consider the point "under debate," (that is, the extent of right with diverging end lines).

Argonaut Min. Co. v. *Kennedy etc. Co.*, 131 Cal., p. 29.

This we construe to be an approval of the conclusions reached by the Federal Court, with a suggestion that the reasoning upon which it was based is not altogether faultless.

Be that as it may, there can be no doubt that the object of the Act of 1872 in insisting upon parallelism of end lines was clearly to prevent the acquisition of a greater length along the vein underneath the surface than the locator had at the surface. A location with converging end lines does not fall within the reason of the rule, and therefore the rule is not applicable. The position of plaintiff in error in this connection may be thus summarized: The Summit owners could have acquired under the Act of 1872 by paralleling the end lines of the claim the same length on the vein underneath the surface throughout its entire depth as they had at the surface. They accepted a patent which purports to give them less underground than they had at the surface, therefore they acquired no part of the vein in depth outside of the vertical bounding planes. We respectfully submit that the conclusion is illogical. "Where the reason of the "rule ceases so should the rule itself."

The patent for the Summit Quartz Mine conveys in terms the underground segment of the vein between the converging end line planes. We think it may be plausibly said that this is a valid grant not only as confirmatory of the rights acquired under the Act of 1866, but because it is within the spirit and intent of the Act of 1872.

However we are not driven, considering the facts of this case, to the necessity of maintaining our rights as flowing solely from the Act of 1872. Our rights antedate the passage of that Act, and were specially preserved and confirmed by it.

As to the legal effect of the quitclaim deed to the Toman Ranch, purporting to have been executed by the Central Eureka Company, Respondent, to the Appellants Toman.

There are no elements of Federal question involved in this branch of the case. The assignments of error assail the rulings of the trial court in sustaining objections to the evidence. We do not think this branch of the case properly before this Court, or that it is entitled to consideration on this writ of error. But as counsel for plaintiff in error has submitted a discussion of the question, we take the liberty of replying.

We think we have clearly demonstrated that at the time of the execution of the quitclaim deed

by defendant in error to plaintiff in error Toman, defendant in error was vested by virtue of the United States patent issued to its predecessor with the fee simple title to the Summit Quartz Mine and the vein having its apex therein, together with all the underground parts of such vein lying between vertical planes drawn through the converging end line planes extended in their own direction.

This being true, the title to that part of the vein lying vertically underneath the surface of the Toman Ranch was severed from the title to the ranch. It was in law an integral part of the Summit Quartz Mine, and could not pass under a conveyance which described only the Toman Ranch.

We reproduce the description contained in the deed:

> "That portion of sections eight and seventeen, township six (6) north, range eleven (11) east, Mt. Diablo base and meridian, lying north of the center of that certain wagon road extending between the town of Ione and Volcano, and known as the Ione and Volcano wagon road, and *lying east of that certain patented mining ground known as the Summit Quartz Mine*, and also east of that patented mining ground known as the Amador Consolidated Mine." (See diagram, *ante*, Figure 1.)

This description necessarily excludes the Summit Quartz Mine and everything pertaining to the "*patented mining ground.*"

The grant to the Summit patentee was of the vein having its top or apex within the claim, throughout its entire depth, between the converging end line planes.

The grant of this extralateral right follows from the statute, whether effect be given to the express grant of that right in the patent or not.

> *Doe* v. *Waterloo Min. Co.*, 54 Fed. 935, 941.

The underground segment of the vein within the Summit end line planes lying underneath the surface of the Toman Ranch would pass by a conveyance of the Summit Quartz Mine, by name, or by description of its surface boundaries.

This principle finds ample authority in the decision of Judge Field in the Eureka case, in which he was supported on appeal by the Supreme Court of the United States.

> *The Eureka Case*, 4 Saw. 302, 326, S. C. on appeal, 103 U. S. 839.
>
> See, also, *Boston and M. Consol. C. and S. Co.* v. *Montana Ore Purchasing Co.*, 89 Fed. 529, 532.

Such a deed, as Judge Field points out, with reference to an agreement fixing a common boundary between two mining claims, neces-

sarily conveys all that the location on the surface carries.

As a corollary to this principle, no part of the extralateral right on a vein acquired through a Federal mining location would be conveyed by a deed simply describing land adjoining into which the vein penetrated. As appears from the cases, this is true where the contiguous land conveyed is the subject of patent under the mining law; *a fortiori* should it be true when land patented under the agricultural laws is conveyed.

A few illustrations from the adjudicated cases will serve to demonstrate this.

Among the numerous controversies arising out of conflicting locations in the Coeur d'Alenes, Idaho, was one involving the respective rights of four mining claims, the relative situation of which is shown on the accompanying diagram (Figure 6):

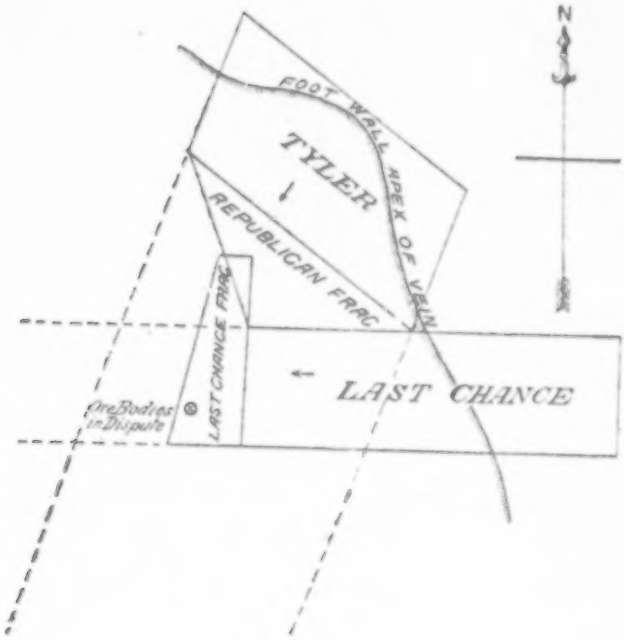

Figure 6.

Priorities had been adjudicated as follows: The Last Chance was first, the Tyler second, and the Last Chance Fraction and Republican Fraction were junior to the first two. The lode passed through the two side lines of the Last Chance, making these lines the true end lines of the claim.

Last Chance M. Co. v. *Tyler M. Co.*, 157 U. S. 683.

On its downward course between these extralateral right planes the vein passed underneath the surface of the Last Chance Fraction and Re-

publican Fraction claims, held in different ownership from either the Tyler or Last Chance.

The extralateral right of the Tyler was adjudicated to be within its end line planes, i. e., to the southward the vein on its downward course passing between these end line planes underneath the surface of the Republican Fraction and Last Chance Fraction, also the Last Chance, but by reason of the latter's priority over the Tyler, the Tyler Company lost so much of the vein underground as was found within the Last Chance end lines, and these lines produced westwardly. At one stage of the litigation the Last Chance Company filed a pleading by which it disclaimed all right, title, or interest in or to the Last Chance Fraction and the Republican Fraction. Subsequently the Tyler Company, asserting its right to the vein within its end line planes underneath the surface of the Republican and Last Chance Fractions, and within the Last Chance extralateral right planes, contended that by this disclaimer the Last Chance Company was estopped from claiming any part of the vein underneath the two fractional claims, notwithstanding its priority and apex ownership in the Last Chance claim. Touching the contention, the Circuit Court of appeals said (italics are ours):

> "The suggestion of counsel for the appel-
> "lant that the Last Chance Company, by its

"pleadings, disclaimed all interest in the "vein in question underneath the surface of "the Republican and Last Chance Fraction "Claims, is not supported by the record. "The Last Chance Company did disclaim "any interest in either of these claims, but, "inasmuch as the vein in question has its "apex within the surface lines of the Last "Chance location, and on its dip under the "true side lines of the Last Chance location "passes under the surface of the Republican "and Last Chance Fraction claims, *it is in "its descent as much a part of the Last "Chance location as if entirely within its "surface lines. It constitutes no part of the "Republican or Last Chance Fraction claims, "and therefore, in disclaiming any interest "in these claims, the Last Chance Company "did not thereby disclaim any interest in the "vein."*

Tyler Min. Co. v. Last Chance Min. Co., 90 Fed. 15, 21.

Suppose the Last Chance Company in the case above cited had owned the three claims—the Last Chance, the Last Chance Fraction, and the Republican Fraction—and had conveyed the two last named, without reserving in terms the extralateral right pertaining to the original Last Chance, could it be contended for a moment that it lost the Last Chance extralateral right, which accrued to it by virtue of the ownership of the apex within the Last Chance surface? Certainly

not, according to the principle announced by the Circuit Court of Appeals. So in the case at bar. If the Central Eureka Company owned both the Summit Mine and the Toman Ranch, its deed to the Toman Ranch would not convey anything pertaining to the Summit Mine.

The principle for which we contend is clearly upheld in a case recently decided by the Circuit Court of Appeals, Ninth Circuit, the facts of which may be best illustrated by the use of a diagram (Figure 7).

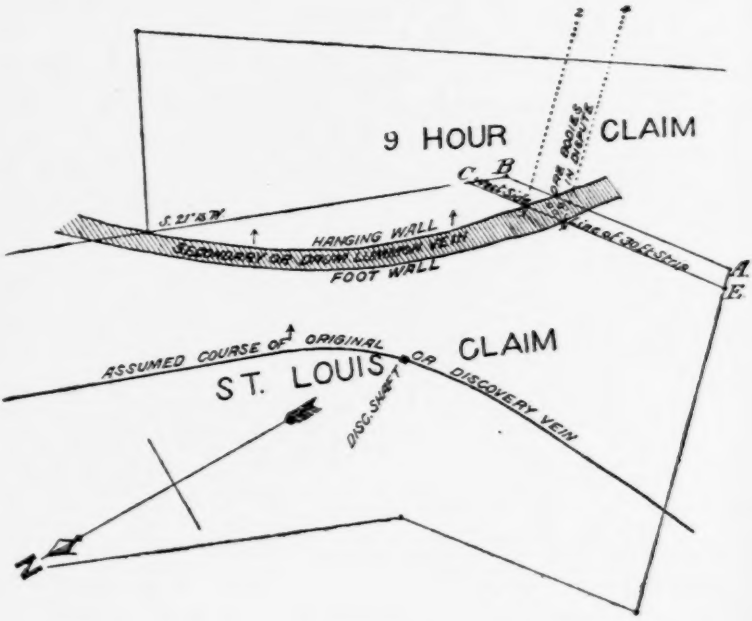

Figure 7

The St. Louis Mining and Milling Company were the owners of the St. Louis Claim, and the Montana Mining Company owned the Nine Hour. Priority was with the St. Louis. Its owners applied for a patent when a controversy arose with owners of the Nine Hour over the boundary between the two claims. A compromise was agreed upon, under the terms of which the St. Louis Company agreed, in the event of its obtaining a patent, to convey to the Montana Company what was called the thirty-foot strip, defined in the above diagram by the letters A, B, C, E.

This conveyance was subsequently executed and delivered, in which the thirty-foot strip was deeded by metes and bounds, "together with all "the mineral therein contained, together with "all the dips, spurs and angles, and also all the "metals, ores, gold and silver-bearing quartz "rock and earth therein."

Subsequently a cotroversy arose over certain ore bodies found underneath the surface of the thirty-foot compromise strip, the St. Louis Company contending that they belonged to a vein (the secondary or Drum Lummon vein shown on the diagram) having its apex within the St. Louis claim. The Montana Company claimed that the ore bodies passed to it under its deed to the thirty-foot strip.

The Court held that—

> " In interpreting the conveyance in ques-
> " tion regard must be had not only to its
> " terms, but to the subject-matter involved
> " and the surrounding circumstances, in
> " order to ascertain the intention of the
> " parties. Said the Court in *Richmond M.*
> " *Co.* v. *Eureka M. Co.*, 103 U. S. 846, 'The
> " 'language used is to be construed with
> " 'reference to the peculiar property about
> " 'which the parties were contracting.' "

It awarded the ore bodies to the St. Louis Company for the reason that the apex of the vein was within the St. Louis claim, and outside of the thirty-foot strip which was conveyed. It will be observed that in the deed involved in that case there not only was no reservation, but the language of the conveyance specified with particularity "all mineral therein contained . . . " all the metals, ores, gold and silver-bearing " quartz, rock and earth therein." In the case at bar the conveyance contains no such language. It is a naked quitclaim to the agricultural land east of the Summit Mine.

In the trial court, counsel for Plaintiffs in Error relied upon the case of *Stinchfield* v. *Gillis*, 96 Cal. 33, and 107 Cal. 84, as authority for their contention that the Central Eureka Mining Company is estopped by its quitclaim deed from asserting any right to that part of the Summit vein underneath the surface of the Toman Ranch. From the reliance placed upon the case in the

lower court and the possibility that they may in their reply to this brief invite this Court's attention to it, we deem it expedient to give our views upon it.

The facts may be illustrated by the following diagram (Figure 8).

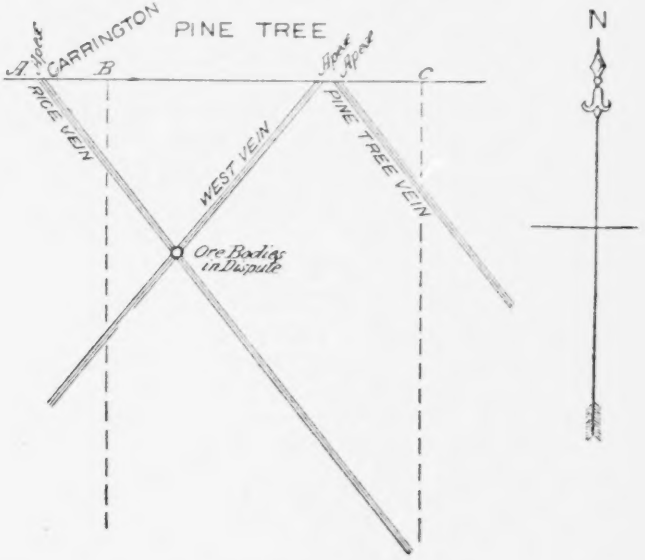

Figure 8.

This is a longitudinal section, the vertical bounding plane between the Carrington and the Pine Tree being represented by the line B-D. The other details shown on the section are self-explanatory. The facts and history of the case are substantially as follows:

One Carrington was originally in possession

of a certain mining claim, consisting of a tract of land about 750 feet in length by about 450 feet in width. After leaving the section of the country where this property was situated, he transferred the same to defendant Gillis. However, no valid location, as required by the laws of the United States, had ever been made.

On January 17, 1866, Gillis, by bargain and sale deed, conveyed to plaintiff Stinchfield a portion of this claim, being a strip of land 171 feet in width on the eastern side thereof.

The strip thus conveyed became known as the Pine Tree mine, and contained two veins, the Pine Tree vein, (which may be omitted from consideration here), dipping to the east, and the west vein, dipping to the west. On the remainder of the Carrington claim there were three systems of veins, all dipping to the east, known respectively as the Carrington vein, the Criss vein and the Rice vein. The Rice vein was composed of three small veins running parallel and in close proximity. Neither the Carrington nor Criss veins are shown on the diagram, as they are not necessary to a proper understanding of the case. The conflict arose over the intersection of the West vein with the Rice vein.

The veins in both claims run in a northwesterly and southeasterly direction, with the exception of the West vein, which runs north and south; and all dip to the east, with the exception

of the West, which dips to the west, and crosses the veins from the Carrington claim at nearly right angles. The only place where gold occurs is at these crossings.

On the day following the conveyance of the Pine Tree mine Gillis located, according to law, the remainder of the Carrington claim. Two days after Gillis had made this location plaintiff Stinchfield also relocated the Pine Tree mine.

Subsequently, while following the Rice vein on its dip under the Pine Tree ground, the tenants of the defendant Gillis encountered the West vein at its intersection with the Rice vein at the point marked on Figure 8 "Ore bodies in dispute." They continued work and extracted all the gold to be found within the space of such intersection. Later plaintiff Stinchfield while working on the West vein, broke into defendant's works at the point of intersection, and found that defendant had already extracted all the gold in that space.

Plaintiff then brought this action for $10,000, the value of the gold alleged to have been removed from the said space of intersection.

The lower court gave judgment for defendants.

The plaintiff on appeal contended that by his deed from defendant Gillis, which purported to convey a mining claim, he became, *as against said defendant and those claiming under him,*

the absolute owner of the surface ground, and of all veins, lodes or ledges having their apices therein, and as a consequence he was the owner of all the gold in the West vein, which apexed in his ground, including that in the space of intersection with the Rice vein. That defendant was estopped by his bargain and sale deed to set up any title to the gold in dispute, or to deny that he had a valid location at the time of the conveyance; that a grantor cannot, after purporting to convey a fee simple estate, subsequently acquire a title to defeat that of the grantee; and that therefore defendant cannot rely on his location, subsequent to the conveyance to plaintiff, to establish a priority in his own claim, which would defeat the right of the plaintiff to the gold in a vein having its apex in plaintiff's land, at a point of intersection with a vein apexing in defendant's ground. Such a course, it was contended, would be equivalent to defendant, representing himself to be the owner of a mining claim which had not been validly located, conveying a portion of the same to plaintiff by bargain and sale deed, and then relocating the whole of the original claim, including that sold to plaintiff, and thus defeating the title he had purported to convey.

On the other hand, defendant's contention was that by section 2336, Rev. St., where veins of different owners intersect, the one having prior-

ity of location is entitled to the ore contained in the space of intersection. That at the time of the conveyance to plaintiff there was no valid location on either claim; that by relocating his claim before plaintiff relocated, defendant acquired the prior location; that at the time of executing the deed defendant had ouly a possessory title, and had in no way connected himself with mining laws of the United States, under which only the rights to these veins could be claimed. That the rule concerning estoppel only applies where there is no proof of *subsequently acquired title from a paramount source;* that defendant claims no right to anything granted to plaintiff, but only the right to follow the vein on its dip, and to have the right to ore at the point of intersection determined by the mining laws.

The court on the first appeal held substantially in accordance with the views of the plaintiff: That after bargain and sale deed defendant could not subsequently obtain any title which he could assert to limit the grantee's estate, and that by his deed defendant was estopped from denying his own title in fee at the date of that conveyance, and therefore necessarily estopped from denying a valid location by himself or his grantor as the basis of such title. "It follows "that no right whatever accrued to the grantor "Gillis *as against his grantee*, the plaintiff, by

"virtue of his subsequent location." The deed of the mining claim passed the Pine Tree Mine, *as against the grantor*, to the same extent as a patent from the U. S. would have done, and included every vein throughout its depth, *which had its apex within the surface boundaries of the claim.*

The order was reversed, cause remanded for new trial.

96 Cal. 33.

On the second trial defendants amended their answers to show that as a matter of fact the Carrington claim originally consisted of two claims, one called the Carrington, and the other the Pine Tree, and the former was located several years before the latter, and the Court so found; but found also that after working such locations Carrington treated them both as one claim, as also did Gillis, and that the boundaries of the portion conveyed to plaintiff did not correspond with the original Pine Tree location.

Defendants contended that since by this state of facts the Carrington was the prior locator, the deed to plaintiff conveyed to him all veins, lodes and ledges having their apices upon the Pine Tree mine throughout their entire depth, but if any such veins, lodes, or ledges intersected any vein, lode, or ledge having its apex on the Carrington, then the ore, at such point of intersec-

tion would belong to the Carrington as the prior location; since under the mining laws, the ore at such point never formed a part of the Pine Tree claim, the junior location which had been conveyed to plaintiff.

The lower court gave judgment for plaintiff, and on appeal the Supreme Court of California held that the ground held by Carrington must be considered as one claim; that whatever distinction may at one time have been observed between the original location of the Carrington Mine and that of the Pine Tree Mine, it was disregarded by Carrington during a large portion of the time these claims were held by him; and they were treated as one claim by his grantee, Gillis. That if the locator of a mining claim conveys a portion of his claim, without any reservation in his deed of conveyance, his grantee would be entitled to all the gold that might be found within the ground conveyed, *in any vein whose apex was within the surface lines of his deed.* In such cases sec. 2336, R. S. of U. S., has no application. Said section was intended merely to regulate the rights of different proprietors claiming under different locations. As the deed contains no reservation, and as there was no evidence at the trial of any mining customs, effect must be given to the deed according to its terms, by holding that the entire West vein within the surface lines, even though intersected by another, passed to

the plaintiff. "In thus holding we concede that, "when mining ground is conveyed by deed without express limitation, the grantee takes subject "to the characteristics of mining property given "to it by prevailing customs and laws, and not "with the absolute dominion which flows from "a conveyance in fee of ordinary land. . . . "Whether the plaintiff would have been entitled to follow the West vein into the ground "retained by Gillis and to claim the gold found "therein, or whether Gillis would have been "entitled to any of the gold that might be found "in the Rice vein within the ground conveyed "to plaintiff, are questions which are not involved in this appeal, and upon which we do "not express any opinion. All that we hold is "that inasmuch as the gold in question was "within the ground conveyed by Gillis to the "plaintiff, *and in a vein whose apex was within "the surface lines of that ground,* it belonged "to the plaintiff."

107 Cal. 84.

From the foregoing analysis of the case it will be observed that the question involved in the case at bar was not decided. If the ground quitclaimed in the case at bar had been conveyed as *mining ground* as was done in the Stinchfield-Gillis case, instead of purporting to relinquish only land patented as agricultural; and if in addition the right of Gillis to follow the Rice

vein *beyond the intersection* with the West vein, underneath the Pine Tree had been challenged, a situation similar to the one involved in the case at bar might have been presented. But the Supreme Court of California distinctly announced that as to this question it declined to pass upon it.

It will be further observed that the Court fully appreciates the force of the principle announced in the St. Louis-Montana case heretofore discussed. The owners of the Pine Tree were awarded the ore bodies in dispute because in the portion of the claim deeded to them was found the *apex* of the West vein, and the conveyance conveyed the vein.

We fully recognize the general principles urged by counsel for Plaintiff in Error as to the force of a quitclaim deed, and the general common-law rule that a conveyance of land carries the minerals unless reserved; but we insist that such rule has no application to the case at bar.

In speaking of the applicability of this common-law doctrine (*cujus est solum*, etc.) to mining conditions of the West, Justice Beatty, now Chief Justice of California, then sitting on the Supreme Court bench of Nevada, said:

> "The doctrine of the common law, that "he who has a right to the surface of any "portion of the earth has also the right to "all beneath and above that surface, has but

"a limited application to the rights of "miners and others using the public lands "of this State. Necessity has compelled a "great modification of that doctrine. . . . "To adhere to the common-law rules on this "subject is simply impossible. To attempt "to carry out common-law doctrines on this "point would either give all the houses in "Virginia to the mining corporations, or "else all the most valuable mines to those "occupying the houses. The well-estab- "lished custom of miners to locate veins of "mineral, claiming to follow them with all "their dips, spurs, and angles, without ref- "erence to the occupancy of the surface, has "compelled a departure from common-law "rules."

Bullion M. Co. v. *Croesus M. Co.*, 2 Nev. 687, 696.

(This was said for the Supreme Court of Nevada in July, 1866,—the very month when this departure from the common-law doctrine ceased to depend alone on the custom of miners and received the express sanction of the national legislature in the Lode and Water Law of 1866.)

The Summit vein was not in law a part of the Toman Ranch. It was, as the authorities heretofore cited assert, as much a part of the Summit mine as if it had been entirely within its vertical boundaries. This was the view taken by the Supreme Court of California and was undoubtedly correct.

An examination of the quitclaim deed in the light of the surrounding circumstances, the different character of the two properties and the apparent motive for the conveyance, disclose a manifest intent not to convey to Appellants any part of the property which belonged to Respondent by virture of its patent to the Summit Quartz Mine.

It is a familiar rule that for the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument and of the parties to it may also be shown so that the Judge may be placed in the position of those whose language he is to interpret.

C. C. P. of Cal., sec. 1860.

The evidence introduced at the trial by the Plaintiffs in Error here, furnished all the light that is necessary to enable the Court to construe the instrument in the light of the circumstances, the situation of the subject of the instrument and of the parties to it.

The deed in question contained the following recital:

> " This deed is made pursuant to the au-
> " thority and resolution of the Board of Di-
> " rectors of party of first part at a meeting
> " thereof held December 31st, 1898."

Trans., fol. 437.

This resolution was introduced in evidence by the appellants prior to the offer of the deed. It will be found in full in the record.

Trans., fols. 360, 372.

From this resolution the ratification of the deed by the stockholders and the other conceded facts found by the Court the circumstances surrounding the execution of the deed clearly appear and may be briefly outlined.

On October 23, 1897, The Central Eureka Company, Defendant in Error here, owned the Summit mine, and the Plaintiffs in Error, Toman, owned the agricultural land which we call the Toman Ranch, lying east of the patented Summit mine. On that day a contract was entered into between the Company and the Tomans, and certain instruments were executed and deposited in escrow with the Bank of California granting to the Central Eureka Company certain privileges with regard to the Toman Ranch. This contract is styled in the resolution a "bond and "option," by which the Tomans had agreed to sell to the Central Eureka Company the Toman Ranch and the Central Eureka Company agreed to purchase the same.

See ratification of stockholders, Trans., fol. 125.

Subsequently the parties to this bond and option mutually agreed to cancel it and withdraw the papers from escrow.

As a consideration of such cancellation the Central Eureka agreed to pay the Tomans $1000; give them its note for $750, and execute a quitclaim deed for the Toman Ranch and as expressed in the resolution (italics are ours):

> "It is further resolved that the President "and Secretary of this incorporation be and "they are hereby authorized to sign, exe- "cute, and deliver all proper and necessary "papers *requisite and necessary to cancel "said contract and to free the land and titles "of said Tomans from any incumbrance.*"

In other words in order to be released from its contract to purchase the Toman Ranch the Central Eureka agreed to pay a cash consideration of $1000, execute a promissory note for $750, and execute all necessary papers requisite to free the land and titles of said Tomans. In other words, to place them in the same position as to such title as they occupied prior to making the contract "bond and option." The quitclaim deed was selected as a method of accomplishing this purpose. The contention of Plaintiffs in Error is that the quitclaim deed not only freed the land and titles of the Tomans, but also conveyed the most essential and valuable part of the patented Summit mine to wit: the extralateral right on the vein having its apex within the Summit claim, which part of the vein is specially reserved out of the patent to the Toman Ranch.

Findings, trans., fol. 90.

In other words, the Tomans were restored to their original estate, received a money consideration, and acquired title to the principal part of the Summit mine, as a consideration for the cancellation of a "bond and option" to purchase the Toman Ranch.

It seems to us that the mere statement of the facts is sufficient to demonstrate the utter lack of plausibility in the contention of Plaintiffs in Error.

Conclusion.

We respectfully urge that we have fully answered all the objections raised by the Plaintiffs in Error. The foregoing argument applies with equal force to all such exceptions and objections, whether directed to the action of the trial Court in refusing a non-suit, rejecting offered evidence, or in reaching the ultimate conclusions upon which the judgment rests.

We respectfully submit that the decision of the Supreme Court of California should be affirmed.

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